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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCALS 666 AND 780 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO, on their own behalf and on behalf of the affected individuals they represent,

Petitioners,

v.

UNITED STATES DEPARTMENT OF LABOR, RAYMOND J. DONOVAN, Secretary of Labor, and WILLIAM M. OTTER, Wage and Hour Administrator, and NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, JAMES M. BEGGS, Administrator, STUART J. EVANS, Administrator for Procurement, and WILLIAM BAULIG, Procurement Officer for RFP 10-2-0049-3,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When NASA decides to consolidate and rebid work covered by the Service Contract Labor Standards Act ("SCLSA") which, as statutorily required, had a wage determination attached to it in order to avoid the undercutting of prevailing labor standards as mandated by statute and regulation, do not the petitioning individuals who performed such work under SCLSA coverage prior to the rebid and the petitioning unions which represent them, have standing to challenge NASA and the Department of Labor's failure to provide the statutorily required wage determination, which failure effectively removed the rebid work from SCLSA coverage?

PARTIES

The caption of the case in this Court contains the names of all parties.

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LOCALS 666 AND 780 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO, on their own behalf and on behalf of the affected individuals they represent,

Petitioners,

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UNITED STATES DEPARTMENT OF LABOR, RAYMOND J. DONOVAN, Secretary of Labor, and WILLIAM M. OTTER, Wage and Hour Administrator, and NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, JAMES M. BEGGS, Administrator, STUART J. EVANS, Administrator for Procurement, and WILLIAM BAULIG, Procurement Officer for RFP 10-2-0049-3,

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PETITION FOR CERTIORARI

Petitioners Locals 666 and 780 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, on their own behalf and on behalf of the affected individuals they represent respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 760 F.2d 141 (C.A. 7, 1985) (App. 1-6). The decision of the United States District Court for the Northern District of Illinois, Judge William T. Hart*, presiding, is not officially reported. It is reprinted at App. 7-10.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 15, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The matter involving the Service Contract Labor Standards Act, 41 U.S.C. §§ 351, *et seq.*, as amended, was originally brought before the district court pursuant to 28 U.S.C. § 1331 and 1361 and pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702-704, 706.

STATUTES AND REGULATIONS INVOLVED

The statutes involved herein are the Service Contract Labor Standards Act, as amended, 41 U.S.C. §§ 351, 353 and 358 ("SCLSA") (App 11-15) and the Administrative Procedure Act, 5 U.S.C. §§ 701-702 and 706 ("APA") (App. 15-18). Also involved herein are 29 C.F.R. §§ 4.4 and 4.123 (App. 18-22).

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* The official reporter erroneously identified the judge as Prentice H. Marshall.

STATEMENT OF THE CASE

Petitioners are Locals 666 and 780 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, and the affected film cameramen, who perform operational and engineering still photography, and film laboratory processors, at the Kennedy Space Center in Florida, all of whom are covered by the SCLSA which statutorily provides and protects employment rights for thousands of people employed by companies performing work under contract with the federal government. The individual Plaintiffs, at the time of the filing of the instant complaint, were employed (many since 1958) as still cameramen and film laboratory employees of Technicolor Government Services, Inc. which performed services for a federal agency, the Defendant National Aeronautics and Space Administration ("NASA"). The Defendant United States Department of Labor ("DOL") plays a central role in the government's procurement of contracts and the establishment of minimum wage rates and fringe benefits under the SCLSA.

Petitioners have brought suit against the two federal agencies and certain of their officials concerning their conduct relative to RFP (Request for Proposals from potential contract bidders) 10-2-0049-3. Said RFP was for NASA's Space Processing Shuttle Contract at Cape Kennedy, Florida. As a federal agency, NASA's RFP was subject to certain procurement related statutes and regulations, such as the SCLSA which covers "every contract (and any bid specification therefore) entered into by the United States . . . the principal purpose of which is to furnish services in the United States through the use of service employees."[1]

Under the present law, until the factual situation giving rise to the instant complaint, federal agencies—including NASA,

[1] 41 U.S.C § 351 (App. 11).

could not simply release an RFP when they wanted a contractor to provide services for them. Prior to releasing the RFP, the contracting agency is required to file a notice of intention to make such a contract with the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration of the DOL. The notice is to be submitted on Standard Form 98, Notice of Intention to Make a Service Contract ("Form 98") which is a written statement concerning the service employees expected to be hired by the contractor and any of its subcontractors.[2] Among the items required to be included in the written statement is a statement as to whether "... the services to be furnished under the proposed contract will be substantially the same as services being furnished for the same location by an incumbent contractor whose contract the proposed contract will succeed, and if such incumbent contractor is furnishing such services through the use of service employees whose wage rates and fringe benefits are the subject of one or more collective bargaining agreements, the contracting agency shall (also) file with its ... (Form 98) a copy of each such collective bargaining agreement together with any related documents specifying the wage rates and fringe benefits currently or prospectively payable under such agreements."[3] Thereafter the DOL is required to make a wage determination and to notify the contracting agency of the determination so that it can be placed in the RFP. The wage determination sets forth the minimum wages and fringe benefits required to be paid for the performance of certain identified work by a successful bidder and its subcontractors. If, however, the Form 98 submitted does not set forth the wage rates and fringe benefits so that a wage determination can issue, DOL is required to return the entire Form 98 to the agency.[4]

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[2] 29 C.F.R. § 4.4(a) (App. 18).

[3] 29 C.F.R. §§ 4.4(b)(1), (b)(2) and (c) (App. 19).

[4] 41 U.S.C. § 358 (App. 14); 29 C.F.R. § 4.4(d) (App. 20).

Not until the wage determination issues is the agency permitted to release its RFP which is required to include, *inter alia*, the wage determination, names of incumbent contractors performing the work and the identification of labor unions representing such collective bargaining units. Thereafter follows a weeding out process through which a contractor is selected. The wage determination is then incorporated into the awarded contract. Over the years, agencies have attempted to ignore or run roughshod over the procurement laws enacted by Congress to protect the SCLSA employee. Indeed, an amendment to the SCLSA was required in 1972 to overcome agency, including, as the legislative history specifically states, NASA and DOL's, wage determination resistance at the same Kennedy Space Center.[5]

The SPC

In January of 1983, NASA issued its RFP 10-2-0049-3 for the Space Processing Shuttle Contract ("SPC"). The SPC combined work theretofore performed by eleven contractors in one prime contract and is staffed by about 6,000 employees at the Kennedy Space Center. As SPC RFP, pg. 250, "Exhibit 7, CHART #1, UNION AGREEMENTS CURRENTLY APPLICABLE TO WORK GOING INTO SPC,"[6] (set forth in its entirety immediately below) reveals, the services provided under the old contracts which were being folded into the SPC included *photography and film processing* and specifically identified Petitioning Unions as having a collective bargaining agreement with Technicolor covering the work performed by the individual Petitioners.

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[5] See, pg. 10, fns. 15 and 16, *infra*.

[6] This appeared as Exhibit A to the Complaint.

EXT NAME: exhibit-7 (R)P: (1/15) 02

RFP 10-2-0049-3
Exhibit 7

CHART #1
UNION AGREEMENTS CURRENTLY APPLICABLE TO WORK GOING INTO SPC (OCTOBER 1, 1982)

***Asterisk indicates Small Business Contractors**

EXPIRATION DATES 1983	1984	1985	INDUSTRIAL CONTRACTOR	INDUSTRIAL UNION	FUNCTION	BARGAINING UNIT EMPLOYEES
5/20			PRC	IBT L. 769	Engr. Support, Drafting & Clerical	190
10/30			*Bionetics	IBEW L. 2088	Standards & Calibration	51
6/1			CSC (Prime)	IBEW L. 2088	CISS	349
6/1			RCA (Sub to CSC)	IBEW L. 2088	CISS—Engineering & Clerical	100 } 401
6/1			RCA (Sub to CSC)	IBEW L. 2088	CISS—Technicians	301 }
	3/31		*USI	IAM L. 1306	Janitorial Services	112
	4/18		BSI-GSO	IAM L. 2061	Production, Maintenance, Life Support & Non-Destruct Techs	791 } 1019
			BSI-SAT	IAM L. 3061	Storekeepers, Dispatchers, etc.	228 }
	9/3		*Wiltech	IAM L. 2061	Semi-Professionals	15
	11/14		BSI-GSO BSI-SAT	FAPE Unit I	Clerical & Technical	248 } 380 132 }
		2/14	[z] **Technicolor**	**IATSE L.666 & L.780**	**Photo & Film Processing**	121
		5/2	US Government GSA	AFGE Council 236	Railroad Operation	8
		11/14	BSI-GSO BSI-SAT	FAPE Unit II	Engineering (Exempt)	203

Footnotes:

1. All located at KSC.
2. Mercury (dba SF&G), Vandenberg is not shown above. Mercury is not CBA.
3. IAM local lodges listed above, are sub-units of IAM District Lodge 166.
4. BSI-GSO and SAT: The IAM, FAPE I and FAPE II individual CBA's cover both GSO and SAT personnel.
5. RCA has two separate IBEW CBA's.
6. Wiltech has two separate IAM CBA's. (Wiltech services not assumed by SPC until March 1984)
7. FAPE I and FAPE II are regarded as two separate unions because of the independent and autonomous status of each.
8. AFGE CBA is a National Agreement with GSA.

Recap: Seven Unions
Thirteen CBA's

[z] Emphasis supplied.

The SPC RFP also provided in its paragraph "1.9.9 *Photography*" that "the SPC (contractor) shall be responsible for providing operational and engineering still photography for tasks that are required in the performance of SPC functions. The SPC (contractor) shall also be responsible for film processing. The Government has provided for an on-site Film Laboratory (Technicolor) for this purpose which the SPC may choose to utilize on a 'no-charge' basis. This processing service will be provided only for the predicted workload contained in the contractor's proposal. (Ref. RFP Section D)."[7]

Despite the specific inclusion of Plaintiffs' work in the SPC RFP there was *no* wage determination in the RFP for the photographers' or film processors' work. Petitioners repeatedly challenged these exclusions, without success.

The Complaint

On July 18, 1983, Plaintiffs filed the complaint in the instant case alleging that Defendants violated the SCLSA by removing the identified work from SCLSA coverage even though the RFP, specifically, as noted above, provided for the continuation of the services. Plaintiffs sought a declaration that NASA submitted an incomplete Form 98 to DOL and a direction to the DOL to return the Form 98 to NASA for completion by including the identified positions with a direction that DOL make a wage determination including the identified work.

The Decisions Below

The district court dismissed the matter "for lack of standing" upon Defendants' FRCP Rule 12 motion to dismiss. The Court of Appeals erroneously affirmed the decision. The Court totally ignored the plain meaning of Section 2 of the SCLSA, 41 U.S.C. § 351, which requires that *all* service contract work receive a wage determination (App. 11, 14). Instead, the Court

[7] This appeared as Exhibit B to the Complaint.

went off on a frolic of its own under Section 4(c) of the SCLSA, 41 U.S.C. § 353(c), (App.13) stating that since Petitioners were not successor SCLSA employees but rather predecessor SCLSA employees they had no standing to bring an action, *i.e.*, there was no injury under Article III of the Constitution and Plaintiffs were not within the prudential test of the zone of interests protected by the SCLSA. Not only, as stated, does this holding totally ignore Section 2 of the SCLSA, but it is completely dependent upon circuitous reasoning since Defendants' actions guarantee that there never will be successor SCLSA employees, thus leaving incumbent employees totally helpless to complain that the established minimum wage and fringe benefit protection has been bureaucratically eliminated.[8]

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The years prior to 1965, saw the exploitation of thousands of employees working for contractors providing services to or performing maintenance services for federal agencies. Congress saw the situation as one where the major price component was the labor cost because the federal agency involved provided the facility and equipment. With other federal laws requiring the lowest bidder to receive the contract, the contractor paying the lowest wage most often would be awarded the contract and under the following RFP new contract bidders would try to lower the wages even further.[9]

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[8] The Seventh Circuit gratuitously, albeit erroneously, added that the SCLSA work was neither being performed nor performed at a lower wage. However, there is absolutely no support for such statement, especially given the fact that in a FRCP Rule 12 motion to dismiss, all pleaded facts in the complaint must be accepted as true. Obviously, the instant complaint made no such allegations and, in fact, the pleading is exactly to the contrary.

[9] 1965 U.S. Code Cong. & Ad News, pg. 3737.

Both houses of Congress recognized the "service worker" as the "only remaining category of Federal contracts" for which labor standards protection had not been provided.[10] The intent, then, of the SCLSA was to "fill the gap in relation to providing a living wage for the many employees that are involved in service contracts."[11] In assessing its own rule and concern with the "service worker," Congress stated that it had "added responsibility in this area because of the (congressionally enacted) legal requirement(s) that contracts be awarded to the lowest bidder."[12] Congress went on to state that "(s)ince labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are heavily stacked in favor of the contractor paying the lowest wages. Contractors who wish to maintain an enlightened wage policy may find it impossible to compete for Government service contracts with those who pay wages to their employees at a below the subsistence level. When a Government contract is awarded to a service contractor with low wage standards, the Government is in effect subsidizing subminimum wages."[13]

Thus in 1965, Congress enacted the SCLSA to protect the service worker by requiring the Department of Labor to enact a wage determination for service contracts in excess of $2,500[14]. In 1970, a special subcommittee of the House of Representatives determined that there were serious problems with the

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[10] Workers on federal construction projects were protected by the Davis-Bacon Act, 40 U.S.C. § 276(a), and employees on federal supply contracts were covered by the Walsh-Healey Public Contracts Act, 41 U.S.C. § 35, *et seq.*

[11] S. Rep. No. 789, 89th Cong., 1st Sess. (1965); H.R. Rep. No. 948, 89th Cong. 1st Sess. (1965); 111 Cong. Rec. 24387 (1965).

[12] 1965 U.S. Code Cong. & Ad. News, pg. 3739.

[13] 1965 U.S. Code Cong. & Ad. News, pg. 3739.

[14] Sections 2(a)(1) and (2) of the SCLSA, 41 U.S.C. §§ 351(a)(1) and (2) (App. 11).

SCLSA[15] because, *inter alia,* "(t)he Department of Labor . . . had failed to make wage determinations for almost two-thirds of the contracts subject to the SCLSA,"[16] "a great deal of labor-management instability (had) arisen because of the failure to take the existence of collective bargaining agreements into account in the wage and fringe benefit determination process,"

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[15] In the Committee's print of "The Plight of Service Workers Under Government Contracts—Report of the Subcommittee on Labor of the Committee on Education and Labor, House of Representatives (1971)," the Committee stated that at NASA's Cape Kennedy facility in Florida, incumbent service workers (of TWA) were being paid $3.85 per hour plus fringe benefits, but that the Department of Labor issued a wage determination of $2.45 per hour plus fringes for some workers and absolutely no wage determination at all for other workers. The Subcommittee concluded, "(w) is very clear is that NASA deliberately set out to cut the wages of service workers, and the protections of the (SCLSA) were unavailable because of the nonfeasance on the part of the Department of Labor." (at pg. 15)

[16] Even while the bill to amend the SCLSA was being considered, it was reported to Congress "despite the present existence of the (SCLSA) a cloud of professional and economic uncertainty hovers over the heads of one million service contract workers fulfilling 25 thousand contracts. Experience at Cape Kennedy (NASA). . . clearly indicates that regardless of how loyal or how hard working or how skilled an employee is, regardless of how long he has been working under one of these service contracts, he faces the possibility . . . that a new company will come in and successfully underbid his employer. When this happens, he finds himself possibly out of work, definitely reduced in income, fringe benefits, seniority and stripped of pension rights." (S Report, 92nd Cong. 2nd Sess., pg. 31282, 1972). Further, testimony of Senator Gurney of Florida was that there was currently a service contract out for bid at Patrick Air Force Base (adjoining NASA at Cape Kennedy), without a wage determination ". . . the worker's pay and his ability to feed his family is now on the auction block. . . . I (Senator Gurney) have requested (a wage determination) twice. The request was denied the first time, and I have not heard from the second request as yet. I certainly hope that (this) committee will help in drafting legislation to accomplish this goal (of protecting the service worker) in this service contract area." H.R. Report, 92nd Cong. 2nd Sess., pg. 27137 (1972).

and that "a section of the act giving the Secretary of Labor discretion in administering the act (had) been stretched far beyond what Congress . . . intended."[17] Discretion except under "rules and regulations allowing reasonable variations, tolerances and exemptions" [41 U.S.C. § 353 (b), App. 13] was no longer permitted. And, there are no such rules and regulations here.

Today, the same type of attack, but in a different form, again threatens the SCLSA employee. The work which Plaintiffs have been performing remains in the RFP but the work has no wage determination assigned to it and thus a non-SCLSA employee may perform the work. Thus, the intention of Congress is being thwarted. The whole situation is reminiscent of what senators and congressmen were talking about before the Special Committees and Congress, as a whole, back in the late 1960's and early 1970's. Congress responded to the transgressions of these same very two agencies with a tongue lashing of indignation and a renewed call for vigilant enforcement of the law. The same response is now needed from this Court before the entire scheme of federal contract procurement becomes totally unravelled.

In *United States v. Rutherford,* 442 U.S. 544, 551-552 (1979), the Supreme Court held that "If a legislative purpose is explained in 'plain and unambiguous language . . . the . . . duty of the courts is to give it effect according to its terms.' Exceptions to clearly delineated statutes will be implied only where essential to prevent 'absurd results' or consequences obviously at variance with the policy of enactment as a whole. . . . Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy. Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attribut-

[17] H.R. Report, 92nd Cong., 2nd Sess., pg. 27136 (1972)

able to congressional design will an exception to statutory language be judicially implied." (citations omitted). Here the Congressional purpose is clear. It is beyond comprehension how any court, as the courts below, could refuse to allow the individual Plaintiffs, who are SCLSA workers, and the Unions who represent them, to bring their APA action to protect work of, and minimum wage standards guaranteed by, the SCLSA. A wage determination should have issued here. Defendants' failure to include the identified work in the wage determination constitutes agency action unlawfully withheld and/or arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. "Section 701 of the (APA), 5 U.S.C. § 701 (Supp. V), provides that the action of each authority of the Government of the United States . . . is subject to review except where there is a statutory prohibition on review or where 'agency action is committed to agency discretion by law.' 5 U.S.C. § 701 (Supp. V). In this case there is no indication that Congress sought to prohibit judicial review and there is most certainly no 'showing of "clear and convincing evidence" of a legislative intent' to restrict access to judicial review (citations omitted). Similarly, the Secretary's decision here does not fall within the exception for action 'committed to agency discretion' . . ." (citation omitted). *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971).

The Seventh Circuit's concept on "standing" conflicts with at least that of two other circuits. In *Scanwell Laboratories, Inc. v. Schaffer,* 424 F.2d 859, 872 (C.A.D.C., 1970), the Court stated that in order to find standing, "responsible federal judges will be able to discern a case in which there is injury in fact, a sufficient adversary interest to constitute a case or controversy under Article III (of the Constitution), and an otherwise reviewable subject matter . . ." pointing out that "(i)n reaching the correct analysis of the threshold question of standing the court must look not to the merits of the petitioner's case but rather to his status, See *Flast v. Cohen,* 392 U.S. 83 (1968)"

(pg. 873) (Emphasis supplied). Standing, where legislative enactments are involved, thus is made to rest on a determination that an interest intended by statute to be protected, has been denied that protection. The members of Plaintiff Unions are service workers whose work was identified in the RFP and whose work has been taken away from them and will be performed at lower wage rates than those contained in Petitioner's collective bargaining agreement with Technicolor. These are the exact workers intended to be protected by the SCLSA which specifically notes that "the remedial purpose of (the Act is) to protect prevailing labor standards." [41 U.S.C. § 353(b), App. 13]. And, even the Department of Labor, itself, in its regulations, recites that "the remedial purpose of the statute (is) to protect prevailing labor standards and to avoid the undercutting of such standards which could result from the award of Government work to contractors who will not observe such standards . . ." [29 C.F.R. § 4.123(b)(1), App. 21]. The exact statutorily prohibited undercutting has occurred here and the regulatory scheme designed to prevent it has been jettisoned. Petitioners, indeed, have a direct stake in what is going on. *Sierra Club v. Morton,* 405 U.S. 727 (1972). Petitioners have clearly demonstrated "actual or threatened injury as the result of the putatively illegal conduct of the defendant", *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 99 (1979), and that injury is more than "fairly (traceable) to the challenged action." *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 38 (1976). Clearly, a wage determination takes away the incentive to replace service workers with others because the price of the labor will remain the same. The incentive to exploit will be taken away because a wage determination will not permit exploitation.

In denying relief to Petitioners, the Seventh Circuit not only held that they did not satisfy the constitutional test under Article III, but also held that they were not within the zone of interests protected by the SCLSA. This, of course, is the

prudential test and it would seem that in our case it probably merges with the constitutional one. It is not necessary, however, to reach that point, for independently, we totally satisfy the prudential test. The seminal cases involving the zone of interests test are the companion cases of *Barlow v. Collins*, 397 U.S. 159 (1970), and *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). *Camp* specifically rejected the previously accepted "legal interest" test of standing because it went to the merits of the case. "The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, *the question whether the interest sought to be protected by the complainant is* **arguably** *within the zone of interests to be protected or regulated by the statute . . . in question.*" (pg. 153) (Italics and emphasis supplied). Continuing, the Supreme Court stated that "(w)here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend." (pg. 154). Petitioners were SCLSA employees. The work they were performing was removed from the SCLSA by reason of the failure of Defendants to include a wage determination in the RFP. It is beyond question that Petitioners' interests are squarely within the zone of interests of a statute enacted to protect service employees. But the test is not squarely, it is only "arguably" and certainly Petitioners satisfy the test. To hold otherwise, as the Seventh Circuit did, runs totally afoul of this Court's decisions in *Camp* and *Barlow*.

Likewise, the Seventh Circuit's decision also conflicts with the decision of the Tenth Circuit in *Painters, Local 419 v. Brown*, 656 F.2d 564, 568 (C.A., 10, 1981), a case involving both the SCLSA and the Davis-Bacon Act. In *Brown*, the Tenth Circuit recognized the standing of a union to sue the Department of Labor for failing to follow its responsibilities under the two statutes. More specifically, the union alleged that the Department of Labor ". . . (d)ivid(ed) projects into a series of contracts for less than the minimum statutory amount for

coverage under the Acts in order to evade the requirements of the Acts . . . (and) defin(ed) contracts which should fall within the Davis-Bacon Act as non-construction to evade the requirements of that Act. . .". The *Brown* court recognized (at pg. 569) that "(p)laintiffs' charge is a serious one and, if proved, requires a remedy if our increasingly bureaucratic society is to retain at least the semblance of accountability. When Congress has passed laws such as the Davis-Bacon Act (and the SCLSA), and where the APA mandates public comment to help shape the regulations promulgated pursuant to such laws, *the judicial process must be available to assure* that the public will manifest in such laws and regulations is not ignored by officials charged with their implementation." (Italics supplied). In sum, the Plaintiffs in *Brown* were not successor employees or even incumbents, rather they were individuals who wanted to work on projects subject to SCLSA and Davis-Bacon and were directly affected by a federal agency's attempt to circumvent the law. The Tenth Circuit stood up and prohibited this monkey business. The Seventh Circuit fell victim to it. What is at stake here is an urgent matter of public policy involving not only the immediate Petitioners, but ultimately the thousands and thousands of service workers who may be eliminated from the coverage of the SCLSA by reason of the abrogation of the obligations thereunder by federal agencies. This case requires this Court's intervention.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this petition for writ of certiorari be granted.

Respectfully submitted,

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Chicago, Illinois
July 11, 1985

APPENDIX

Opinion of the United States Court of Appeals for the Seventh Circuit, 760 F.2d 141 (C.A. 7, 1985) ..... App. 1

Memorandum Opinion and Order, United States District Court for the Northern District of Illinois December 7, 1983 ..... App. 7

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In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1104

LOCALS 666 AND 780 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO, on their own behalf and on behalf of the affected individuals they represent,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR, RAYMOND J. DONOVAN, Secretary of Labor, and WILLIAM M. OTTER, Wage and Hour Administrator, and NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, JAMES M. BEGGS, Administrator, STUART J. EVANS, Administrator for Procurement, and WILLIAM BAULIG, Procurement Officer for RFP 10-2-0049-3,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83-C-4876—William T. Hart, *Judge.*

ARGUED DECEMBER 5, 1984—DECIDED APRIL 15, 1985

Before CUMMINGS, *Chief Judge*, ESCHBACH, *Circuit Judge*, and GRANT, *Senior District Judge.**

* Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, sitting by designation.

GRANT, *Senior District Judge.* Plaintiffs-Appellants, Locals 660 and 780, etc. [hereinafter the Union], filed an action against Defendants-Appellees, the Department of Labor [DOL] and the National Aeronautics and Space Administration [NASA], charging them with a violation of the Service Contract Act [SCA], 41 U.S.C. §§ 351-58 (1976). The United States District Court for the Northern District of Illinois, Eastern Division, granted the DOL's and NASA's motion to dismiss, finding that the Union lacked standing to pursue its claim. This appeal followed.

Facts

During the developmental phase of the Space Shuttle, NASA required a substantial amount of sophisticated photograph and film processing services. Union members, who were employees of Technicolor Government Services, Inc., performed the services.

However, when the Space Shuttle Program reached the operational phase, NASA anticipated that it would no longer need the expertise of Union members to perform still photography and certain film processing tasks. Thus, NASA consolidated functions performed under the Technicolor contract with several other Space Shuttle support functions into a single contract, the [Space] Shuttle Processing Contract [SPC].

NASA invited bids on the SPC and awarded it to Lockheed Space Operations Company on October 1, 1983. The SPC eliminated all still photography positions and numerous film processor positions. The SPC did not, however, eliminate the need for all still photography and film processing. Instead, NASA intended that the work would be performed by engineers, technicians, and inspectors as an incidental part of their regular duties, using highly automated equipment.

The SCA, 29 C.F.R. § 4.4(c) (1983), covers the SPC. It requires the submission of a Form 98 when a successor

contractor provides services "substantially the same as services being furnished for the same location by an incumbent contractor..." and when the incumbent service employees are covered by a collective bargaining agreement. Moreover, submission of a Form 98 triggers the DOL's duty to make a determination of minimum wages and fringe benefits "for the classes of service employees who will perform the contract..." 29 C.F.R. § 4.164(b)(2) (1983).

NASA submitted a Form 98 for the SPC but did not include still photographer and film processor positions because the SPC did not require them. Thus, the DOL did not issue a wage determination for those positions.

The Union brought an action against NASA and the DOL contending that NASA violated the SCA by allowing still photography and film processing to be included in the SPC without submitting the actual positions of still photographer and film processor to the Secretary of Labor for wage determination. In addition, the Union asserted that the DOL failed to return the Form 98 to NASA for correction.

The Union asked the district court to temporarily, preliminarily, and permanently enjoin NASA from awarding the SPC until the excluded positions were added to the Form 98. The district court dismissed the action, finding that the Union lacked standing because its complaint did not fall within the SCA's zone of interest.

Issue

The issue before this Court is whether the former service employees and their representative Union have standing to sue under the Administrative Procedure Act [APA] when their work has been consolidated into a subsequent contract and awarded without a wage determinination by the DOL.

Under the APA, 5 U.S.C. § 702 (1980),

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review.

However, a litigant seeking relief in federal court must satisfy *both* constitutional and prudential limitations in order to have standing to sue. The Article III constitutional limitations have been summarized by the Supreme Court in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1981):

> ... [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

The prudential limitations on standing are those imposed by the courts themselves:

> ... Thus, this Court has held that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). In addition, even when the plaintiff has alleged a redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating "abstract questions of wide public significance" which amount to "generalized grievances," pervasively shared and most appropriately addressed in the representative branches. *Id.* at 499-500. Finally, the Court has required that the plaintiff's complaint fall within "the zone of interests to be protected or regulated by the statute or constitutional

> guarantee in question." *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

Valley Forge, 454 U.S. at 474-75.

The Union first alleges that it has been injured because work has been taken away from its members and is now being performed by others at lower wage rates. However, under the language of the SCA, loss of work is not an injury:

> No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract ....

41 U.S.C. § 353(c) (1976). The statute only recognizes an "injury" to successor employees who are paid less than their predecessors for performing the same services. The status of predecessor employees is only relevant in establishing a wage and benefit floor for successor contracts. Because the Union members are "predecessors" under the SCA, their claim of lost jobs is not an "actual or threatened" injury for the purposes of standing under Article III. *Valley Forge*, 454 U.S. at 475-76.

The Union's second claimed injury is that its members have been exploited by the failure of the DOL to make a wage determination. The Union claims that a wage determination keeps wages the same for successor employees performing the same services as their predecessors, thereby taking away a successor contractor's incentive to exploit.

We first note that, in the instant case, the same work is not being performed by others at lower wage rates. NASA no longer requires the sophisticated photographic services that it needed during the Space Shuttle's developmental phase. Engineers, technicians, and inspectors now fulfill the limited photography services as an incidental part of their duties, using highly automated cameras that do not require special expertise. The former positions have been eliminated rather than reclassified as the Union alleges.

Moreover, only employees and unions representing those employed under successor contracts may bring an action under the SCA challenging the practices of the successor employer. Displaced contractors, employees, and their unions are not within the zone of interests protected by the SCA. *See American Federation of Government Employees, AFL-CIO v. Stetson*, 640 F.2d 642, 646 (5th Cir. 1981). Therefore, the Union and its members do not have standing to bring their claim.

The judgment of the district court is therefore AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—4-15-85—450

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

LOCAL 666 AND 780 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, and AFL-CIO on their own behalf and on behalf of the affected individuals they represent,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF LABOR, RAYMOND J. DONOVAN, SECRETARY OF LABOR, and WILLIAM M. OTTER, Wage and Hour Administrator, and NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, JAMES M. BEGGS, Administrator, STUART J. EVANS, Administrator for Procurement, and WILLIAM BAULIG, Procurement Officer for RFP,

Defendants.

No. 83- C 4876

MEMORANDUM OPINION AND ORDER

Locals 666 and 780 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO (the "Locals") bring this action against Raymond J. Donovan, as Secretary of the United States Department of Labor, (the "Secretary") and the National Aeronautics and Space Adminis-

tration ("NASA"), alleging violations of the Service Contract Act (the "Act"). 41 U.S.C. §§ 351, *et seq.* The Locals represent approximately 120 photographers and film processors employed by Technicolor Government Services, Inc. ("Technicolor"). Technicolor holds a contract with NASA, running through 1985, for still photography and related film processing to be performed in development of the Space Shuttle Program.

The case arises from NASA's efforts to change over contracts connected with the Space Shuttle from development to an operational-commercial basis. As part of the changeover, NASA recently consolidated the functions performed under the Technicolor contract with several other Space Shuttle support functions into a single contract, the Shuttle Processing Contract ("SPC"). NASA awarded the SPC to Lockheed Space Operations Company ("Lockheed") on October 1, 1983.

The SPC will result in the elimination of all still photographer's positions and a major reduction of film processor positions connected with the Space Shuttle. The SPC will not, however, eliminate the need for all still photography. Roughly 3 man-years of still photography work will remain. NASA and Lockheed contemplate that this photography work will be spread among 200-400 engineers, technicians and inspectors, as an incidental part of their regular duties.

The Locals contend that NASA violated the Service Contract Act by allowing still photography and film processing to be included in the SPC without submitting the positions of still photographer and film processor to the Secretary for wage determinations. NASA does not contest the applicability of the Act to the photographers' and processors' positions. Nor does NASA contest its duty to submit to the Secretary a Form 98, containing a listing of all *positions* in the SPC that were previously covered by other government service contracts. NASA does argue that it retains the right to eliminate certain positions, and that it need not include in its submission to the

Secretary any positions that will be eliminated by the SPC. NASA further contends that the Locals do not have standing to bring this action charging violations for the Service Contract Act, as the Locals are not within the zone of interests which the Act seeks to protect.

The purpose of the Act was to guarantee that successor contractors would not pay lower wage rates for the same work performed under prior government contracts. Congress felt that allowing bidders to win government contracts by depressing service wage rates was contrary to established labor policy. *See American Federation of Government Employees, Local 1668 v. Dunn,* 561 F.2d 1310, 1312 (9th Cir. 1977). The Locals are correct in asserting that a successor contractor could not avoid the requirements of the Act merely by changing the job title or classification of employees who, under a successor contract, would perform the same duties as were performed under the predecessor contract.

However, the Court must agree with NASA, that the Locals do not have standing to challenge NASA's actions in this case. Only employees and unions representing those employed under the successor contract may bring such a challenge. Displaced contractors, employees and their unions are not within the zone of interests protected by the Act. *American Federation of Government Employees, AFL-CIO v. Stetson,* 640 F.2d 642, 646 (5th Cir. 1981) (rights of former civil service custodial workers, and their union, displaced by decision to "contract out" custodial services are outside the zone of interests protected by the Service Contract Act); *American Federation of Government Employees, Local 1668 v. Dunn, supra* at 1313 (former civil service employees and their labor union "have failed to convince us that their interests are within the zone of interests to be protected by the Service Contract Act"); *Service Employees International, Local 36 v. G.S.A.,* 443 F. Supp. 575, 580 (E.D. Pa. 1977) (union local representing predecessor government cleaning contractor's employees "lacks

standing to argue noncompliance [by successor contractor] with prevailing [wage] rates" since any arguable injury is outside the zone of interests to be protected by the Service Contract Act). Successor contractors are not required to hire former service employees. *Trinity Services, Inc. v. Marshall,* 593 F.2d 1250, 1260 (D.C. Cir. 1978) Therefore, such employees and their unions have no interest in the enforcement of the Act.

The Locals lack of standing is further illustrated by the Court's inability to redress their alleged injury by a decision to grant the relief the Locals' request. The Locals ask the Court to order NASA to submit to the Secretary a Form 98 including positions for still cameramen and film processors. As NASA points out, this relief, if granted, would not result in the hiring of a single additional cameramen or film processor. Nor would it affect the wage rates paid to anyone employed by Lockheed in performance of the SPC. The Court's ability to redress the alleged injury casts serious doubt upon plaintiffs' standing. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 475 (1982).

IT IS THEREFORE ORDERED that defendants' motion to dismiss for lack of standing is granted. This action is dismissed in its entirety.

ENTER:

WILLIAM T. HART
UNITED STATES DISTRICT JUDGE

Dated: Dec. 7, 1983

41 U.S.C. § 351

§ 351. Required contract provisions; minimum wages

(a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b) of this section.

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for in such agreement as a result of arm's-length negotiations. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the

foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

(3) A provision that no part of the services covered by this chapter will be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

(4) A provision that on the date a service employee commences work on a contract to which this chapter applies, the contractor or subcontractor will deliver to the employee a notice of the compensation required under paragraphs (1) and (2) of this subsection, on a form prepared by the Federal agency, or will post a notice of the required compensation in a prominent place at the worksite.

(5) A statement of the rates that would be paid by the Federal agency to the various classes of service employees if section 5341 or section 5332 of Title 5 were applicable to them. The Secretary shall give due consideration to such rates in making the wage and fringe benefit determinations specified in this section.

(b)(1) No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees and no

subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 206(a)(1) of Title 29.

(2) The provisions of sections 352 to 354 of this title shall be applicable to violations of this subsection.

(Pub.L. 89-286, § 2, Oct. 22, 1965, 79 Stat. 1034, amended Pub.L. 92-473, §§ 1, 2, Oct. 9, 1972, 86 Stat. 789; Pub.L. 94—489, §§ 1, 2, Oct. 13, 1976, 90 Stat. 2358.)

41 U.S.C. § 353

§ 353. Law governing authority of Secretary

(a) Enforcement of chapter

Sections 38 and 39 of this title shall govern the Secretary's authority to enforce this chapter, make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact, and take other appropriate action hereunder.

(b) Limitations and regulations allowing variations, tolerances, and exemptions

The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this chapter (other than section 358 of this title), but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this chapter to protect prevailing labor standards.

(c) Predecessor contracts; employees wages and fringe benefits

No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which

substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided,* That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

(d) Duration of contract

Subject to limitations in annual appropriation Acts but notwithstanding any other provision of law, contracts to which this chapter applies may, if authorized by the Secretary, be for any term of years not exceeding five, if each such contract provides for the periodic adjustment of wages and fringe benefits pursuant to future determinations, issued in the manner prescribed in section 351 of this title no less often than once every two years during the term of the contract, covering the various classes of service employees.

(Pub.L. 89-286, § 4, Oct. 22, 1965, 79 Stat. 1035, amended Pub.L. 92-473, § 3, Oct. 9, 1972, 86 Stat. 789.)

41 U.S.C. § 358

§ 358. Wage and fringe benefit determinations of Secretary

It is the intent of the Congress that determinations of minimum monetary wages and fringe benefits for the various classes of service employees under the provisions of paragraphs (1) and (2) of section 351 of this title[1] should be made with

[1] So in original. Probably should read paragraphs (1) and (2) of subsection (a) of section 351 of this title.

respect to all contract subject to this chapter, as soon as it is administratively feasible to do so. In any event, the Secretary shall make such determinations with respect to at least the following contracts subject to this chapter which are entered into during the applicable fiscal year:

(1) For the fiscal year ending June 30, 1973, all contracts under which more than twenty-five service employees are to be employed.

(2) For the fiscal year ending June 30, 1974, all contracts under which more than twenty service employees are to be employed.

(3) For the fiscal year ending June 30, 1975, all contracts under which more than fifteen service employees are to be employed.

(4) For the fiscal year ending June 30, 1976, all contracts under which more than ten service employees are to be employed.

(5) On or after July 1, 1976, all contracts under which more than five service employees are to be employed.

(Pub.L. 89-286, § 10, as added Pub.L. 92-473, § 5, Oct. 9, 1972, 86 Stat. 790, and amended Pub.L. 94-273, § 29, Apr. 21, 1976, 90 Stat. 380.)

5 U.S.C. § 701

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

5 U.S.C. § 702

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review

thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

29 C.F.R. § 4.4

§ 4.4 Notice of intention to make a service contract.

(a) Not less than 30 days prior to any invitation for bids, request for proposals, or commencement of negotiations for any contract exceeding $2,500 which may be subject to the Act, the contracting agency shall file with the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, Department of Labor, its notice of intention to make a service contract. Such notice shall be submitted on Standard Form 98, Notice of Intention to Make a Service Contract, which shall be completed in accordance with the instructions provided and shall be supplemented by the information required under paragraphs (b) and (c) of this section. Supplies of Standard Form 98 are available in all GSA supply depots under stock number 7540-926-8972.

(b) The contracting agency shall file with its Notice of Intention to Make a Service Contract (SF-98) a statement in writing containing the following information concerning the service employees expected by the agency to be employed by the contractor and any subcontractors in performing the contract:

(1) The number of such employees of all classes, or a statement indicating whether such number will or will not exceed the number for which a wage determination is mandatory under the provisions of § 4.3(a); and

(2) A listing of those classes of service employees expected to be employed under the contract which, if employed by the agency, would be subject to the wage provisions of 5 U.S.C. 5341 or 5 U.S.C. 5332, together with a specification of the rates of wages and fringe benefits that would be paid by the Government to employees of each such class if such statute were applicable to them. (Under section 2(a)(5) of the Act and § 4.6 the inclusion of such a statement in the service contract is also required.)

(c) If the services to be furnished under the proposed contract will be substantially the same as services being furnished for the same location by an incumbent contractor whose contract the proposed contract will succeed, and if such incumbent contractor is furnishing such services through the use of service employees whose wage rates and fringe benefits are the subject of one or more collective bargaining agreements, the contracting agency shall file with its Notice of Intention to Make a Service Contract (SF-98) a copy of each such collective bargaining agreement together with any related documents specifying the wage rates and fringe benefits currently or prospectively payable under such agreement. If such services are being furnished for more than one location and the collectively bargained wage rates and fringe benefits are different for different locations or do not apply for one or more locations, the agency shall identify the locations to which such

agreements have application. In the event that the agency has reason to believe that any such collective bargaining agreement was not entered into as a result of arms-length negotiations, a full statement of the facts so indicating shall be transmitted with the copy of such agreement. If the agency has information indicating that any such collectively bargained wage rates and fringe benefits are substantially at variance with those prevailing for services of a similar character in the locality, the agency shall so advise the Office of Government Contract Wage Standards and, if it believes a hearing thereon pursuant to section 4(c) of the Act is warranted, shall file its request for such hearing pursuant to § 4.10 at the time of filing the Notice of Intention to Make a Service Contract (Form SF-98).

(d) Any Standard Form 98 submitted by a contracting agency without the information required under paragraphs (b) and (c) of this section will be returned to the agency for further action.

(e) If exceptional circumstances prevent the filing of the notice of intention and supplemental information required by this section on a date at least 30 days prior to any invitation for bids, request for proposals, or commencement of negotiations for a proposed contract subject to section 2(a) of the Act, the notice shall be submitted to the Office of Government Contract Wage Standards as soon as practicable with a detailed explanation of the special circumstances which prevented timely submission.

[37 FR 25469, Nov. 30, 1972, as amended at 42 FR 43064, Aug. 26, 1977; 43 FR 28467, June 30, 1978]

29 C.F.R. § 4.123

§ 4.123 Administrative limitations, variations, tolerances, and exemptions.

(a) *Authority of the Secretary.* The Act, in section 4(b) authorizes the Secretary to "provide such reasonable limita-

tions" and to "make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business." This authority is similar to that vested in the Secretary under section 6 of the Walsh-Healey Public Contracts Act (41 U.S.C. 40) and under section 105 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 331).

(b)(1) *Administrative action under section 4(b) of the Act.* The authority conferred on the Secretary by section 4(b) of the Act will be exercised with due regard to the remedial purpose of the statute to protect prevailing labor standards and to avoid the undercutting of such standards which could result from the award of Government work to contractors who will not observe such standards, and whose saving in labor cost therefrom enables them to offer a lower price to the Government than can be offered by the fair employers who maintain the prevailing standards. Administrative action consistent with this statutory purpose may be taken under section 4(b) with or without a request therefor, when found necessary and proper in accordance with the statutory standards. No formal procedures have been prescribed for requesting such action, except as provided in paragraph (b)(2) of this section. However, a request for exemption from the Act's provisions will be granted only upon a strong and affirmative showing that it is necessary and proper in the public interest or to avoid serious impairment of Government business. If the request for administrative action under section 4(b) is not made by the headquarters office of the contracting agency to which the contract services are to be provided, the views of such office on the matter should be obtained and submitted with the request or the contracting officer may forward such a request through channels to the agency headquarters for submission with the latter's views to the Administrator of the Wage and Hour Division, Department

of Labor, whenever any wage payment issues are involved. Any request relating to an occupational safety or health issue shall be submitted to the Assistant Secretary for Occupational Safety and Health, Department of Labor.

(2) *Occupational safety and health issues.* In considering any request for a variation on any occupational safety or health issue arising under the contract clause prescribed in § 4.6(f), there shall be provided procedural safeguards equivalent to those prescribed in section 6(d) of the Occupational Safety and Health Act of 1970 (84 Stat. 1596). Pending the adoption of rules of procedure applying the aforementioned section 6(d), the applicable rules of procedure shall be specified in the notice of any hearing which may be provided.

(c) *Documentation of official action under section 4(b).* All papers and documents made a part of the official record of administrative action pursuant to section 4(b) of the Act are available for public inspection in accordance with the regulations in 29 CFR Part 70. Limitations, variations, tolerances and exemptions of general applicability and legal effect promulgated pursuant to such authority are published in the FEDERAL REGISTER and made a part of the rules incorporated in this Part 4. For convenience in use of the rules they are set forth in the sections of this part covering the subject matter to which they relate, rather than as a separate listing. (See, for example, the exemption provided in § 4.5(b) and the limitations set forth in §§ 4.115 et seq.) Any rules that are promulgated under section 4(b) of the Act relating to subject matter not dealt with elsewhere in this Part 4 will be set forth immediately following this paragraph.

[33 FR 9880, July 10, 1968, as amended at 36 FR 9864, May 29, 1971, 43 FR 28467, June 30, 1978]